

RECEIVED

EX PARTE OR LATE FILED
 AT&T

Robert W. Quinn, Jr.
Director - Federal Government Affairs

MAY 12 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Suite 1000
1120 20th St., NW
Washington, DC 20036
202 457-3851
FAX 202 457-2545

May 12, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street SW, Room TWB-204
Washington, D.C. 20554

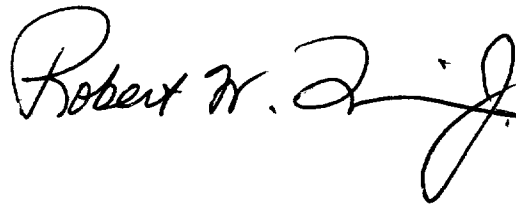
RE: Notice of Ex Parte meeting
Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98

Dear Ms. Roman Salas:

On Monday May 10, 1999 Richard Rubin, C. Michael Pfau, and I, of AT&T, and Peter Keisler of Sidley & Austin met with Michael Pryor, Jake Jennings, Claudia Fox, Bill Sharkey and Chris Libertelle of the Common Carrier Bureau's Policy and Program Planning Division to discuss AT&T's initial views with respect to this proceeding. The views expressed during the meeting were consistent with those expressed in the paper filed in this docket on February 11, 1999 (a copy of which is attached hereto).

Two copies of this Notice are being submitted to the Secretary of the FCC.

Sincerely,



cc: M. Pryor
J. Jennings
C. Fox
B. Sharkey
C. Libertelle

No. of Copies rec'd 071
List A B C D E



Recycled Paper



Albert M. Lewis, Esq.
Federal Government Affairs
Vice President

Suite 1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-2009
FAX 202 457-2127

February 11, 1999

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, SW Room TWB-204
Washington, DC 20554

RECEIVED
FEB 11 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex parte - CC Docket No. 96-98
In the Matter of the Local Competition
Provisions in the Telecommunications Act of 1996

Dear Ms. Salas:

The enclosed is being filed for inclusion in the record of this proceeding.
Copies are also being provided to the individuals listed below.

Two copies of this Notice are being submitted to the Secretary of the
Commission in accordance with Section 1.1206(b)(1) of the Commission's Rules.

Very truly yours,

Enclosures

cc: Mr. C. Wright
Mr. L. Strickling
Mr. R. Atkinson
Ms. C. Matthey
Mr. R. Pepper
Mr. D. Stockdale
Mr. T. Power
Mr. P. Gallant
Mr. K. Martin

Ms. K. Brown
Ms. M. Carey
Mr. J. Jennings
Mr. M. Pryor
Ms. V. Yates
Mr. L. Bourne
Ms. L. Kinney
Mr. K. Dixon
Ms. C. Fox

Remand Proceeding on Rule 319

Introduction

In AT&T Corp. v. Iowa Utilities Board, the Supreme Court upheld all but one of the local competition rules that had been challenged. Critically, the Court restored the Commission's broad jurisdiction to adopt rules interpreting and implementing the local competition provisions of the Communications Act, and it affirmed the reasonableness of virtually all of the Commission's unbundling rules.

At the same time, however, the Court vacated Rule 51.319 ("Rule 319") and remanded that aspect of the First Report and Order for further proceedings in light of the Court's decision. Rule 319 identified the network elements that incumbent LECs must make available to new entrants, based in part on the Commission's prior application of the factors set forth in Section 251(d)(2). The Commission must now develop and apply a new Section 251(d)(2) test that is consistent with the Court's decision, and promulgate a new rule identifying the network elements that must be made available under Section 251(c)(3).

The Supreme Court held that the Commission's prior interpretation of the Section 251(d)(2) factors was extreme -- not in the results it ultimately reached but in the

standard it applied. The Supreme Court found that this interpretation -- under which the Commission inquired whether the functionality performed by a proposed network element somehow could be obtained from a different element in the same LEC network at no greater cost -- virtually guaranteed that any requested element would satisfy Section 251(d)(2). The Court's holding, therefore, was exceptionally narrow and requires only that the Commission adopt a standard that contains a limiting principle that is more closely grounded in the statute and its purposes. In responding to the remand, therefore, the Commission should be careful to distinguish between the two specific aspects of its prior analysis that the Court found inadequate and the many other portions of its analysis that the Court did not question and that remain valid and fully applicable. Incumbent LECs now appear to be seeking to undo some of those latter portions of the Commission's analysis -- holdings that they were either unsuccessful in challenging or that they never challenged at all. Accordingly, it is helpful to review what the Court did not do before addressing what it did.

I. Aspects of the Commission's Analysis that the Supreme Court Did Not Disturb

The vast majority of the Commission's prior analysis was not called into question by the Court's decision. We

summarize five of the most significant such aspects of that analysis.

First and most fundamentally, the Commission's First Report and Order adopted a categorical approach to identifying network elements. The Commission required that the elements listed in Rule 319 be made available on the same basis in all geographic areas, to all new entrants, and for all types of customers. See First Report and Order, ¶ 242 (explaining that "[n]ational requirements for unbundled elements" are necessary). The incumbents argued before the Supreme Court that more individualized decisions should be made under Section 251(d)(2).¹ Nevertheless, the Supreme Court did not adopt that argument or in any way question the

¹ Indeed, at oral argument, the incumbent LECs specifically (and unsuccessfully) argued for a market-by-market, carrier-by-carrier approach:

MR. BARR: We are dealing -- first, I would bear in mind that we're dealing with local markets, and I -- and the FCC promulgates -- has the tools to address local markets. They promulgate rules every day of the week that make distinctions between concentrated urban markets and dispersed rural markets. Every day of the week. Moreover, they have the tool of arbitration which gets you down to a carrier-by-carrier level. They could easily say in New York where there are dozens of switches, in New York where there are companies that have built from soup to nuts entire networks -- there are people building it today without taking any of our pieces. They could say that in certain markets, certain kinds of businesses don't need certain things.

categorical approach taken by the Commission. To the contrary, it signaled its expectation that whichever network elements are identified by the Commission on remand would be made available "unconditionally," Slip Op. at 25, and specifically noted that some of the Commission's analysis -- all of which was categorical in nature -- could support the "higher standard" the Court was requiring. Id., p. 24.

Moreover, such a categorical approach is clearly correct, both as a matter of law and policy. Section 251(d)(2) expressly designates the Commission as the agency that is responsible for "determining what network elements should be made available for purposes of subsection (c)(3)." If Congress had intended the core list of minimum network elements to vary by region and be based on local conditions, it would instead have provided for State Commissions to make such decisions in the first instance, subject to more general FCC rules. Indeed, Congress took this exact path in dealing with several other matters, such as resale restrictions (see Section 251(c)(4)(B)) and rural exemptions (see Section 251(f)). Congress' decision not to apply such a paradigm to Sections 251(c)(3) and 251(d)(2) strongly supports the Commission's conclusion that the minimum list of unbundled elements should be developed on a uniform nationwide basis.

Tr. at 67.

The statute likewise supports -- indeed, compels -- the Commission's prior decision not to distinguish between CLECs in determining which network elements must be made available. In a holding that has never been challenged, the Commission concluded that Section 251(c)(3)'s requirement of "nondiscriminatory access" mandates, among other things, that "the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element." First Report and Order, ¶ 312 (emphasis added). Any approach to identifying network elements that varied by carrier would thus violate the nondiscrimination requirement of Section 251(c)(3).²

Such an approach would also be precluded by Section 252(i), the so-called "pick and choose" provision, which applies the nondiscrimination obligation by requiring an incumbent LEC to make available "any . . . network element" provided under an interconnection agreement with one CLEC "to any other requesting telecommunications carrier upon the same terms and conditions." The Supreme Court confirmed that the Commission properly construed this requirement to

² Such a holding would also violate Section 251(c)(3)'s requirement that network elements be made available to "any" requesting telecommunications carrier. See Slip Op. at 25 (relying in part on the use of "any" in Section 251(c)(3) in upholding the Commission's refusal to distinguish between CLECs that do or do not own facilities in requiring incumbents to provide access to network elements).

apply to individual network elements provided under an agreement and not merely, as the Eighth Circuit had held, to agreements taken as a whole. Slip Op. at 28-29. If the Commission held that an incumbent LEC must make a network element available to one CLEC but could simultaneously deny it to another CLEC, such a ruling would squarely violate Section 252(i).

A categorical approach to the definition of network elements is also necessary to achieve the statutory objective of "rapid" development of local competition. Any other approach would enable incumbents to engage in scores of piecemeal challenges, locality by locality, claiming that access to a particular network element is not justified based on claimed local market conditions -- and then, even upon losing, immediately initiate new challenges on the ground that the market had further developed during the course of the prior litigation. Thus, the Commission was on solid ground in concluding that categorical rules are essential to "reduce the likelihood of litigation regarding the requirements of Section 251(c)(3) and the costs associated with such litigation" and "provide financial markets with greater certainty in assessing new entrants' business plans, thus enhancing the ability of new entrants, including small entities, to raise capital." First Report and Order, ¶ 242.

Second, the First Report and Order, in identifying loops, switching, transport, signaling, and operator services as network elements, relied not only on its consideration of the factors set forth in Section 251(d)(2), but also on the fact that those specific items are part of the Section 271 "competitive checklist."³ It is difficult to conceive of a rationale under which Congress could have determined that a particular element was sufficiently critical to opening local markets that it must be included as part of the checklist, but not important enough to satisfy the standards of Section 251(d)(2). Nothing in the Court's opinion disputed the obvious relevance of this consideration to the Commission's analysis.

Third, the Court did not call into question the underlying rationale for the statutory unbundling requirement: the need to require incumbents to share their enormous "economies of density, connectivity, and scale" in order to make meaningful competition possible. First Report and Order, ¶ 11. As the Commission held, Congress recognized that these LEC advantages had created "the most significant economic impediments to efficient entry into the monopolized local market," and were viewed as "creating a

³See, e.g., First Report and Order, ¶ 377 (loops); id., ¶ 410 (switching); id., ¶ 439 (transport); id., ¶ 479 (signaling and databases); id., ¶ 534 (operator services and directory assistance).

natural monopoly." Id. Therefore, in applying Section 251(d)(2) in a manner "rationally related to the goals of the Act," Slip Op. at 21, the Commission must advance those goals by ensuring that new entrants are able to enjoy comparable economies to the incumbents, so that they have the opportunity to compete effectively.

Relatedly, there is no basis in the Supreme Court's opinion, or in the statute, for resurrecting the broad
"contrary arguments the incumbent LECs have continually raised against the concept of unbundled access. The Eighth Circuit properly rejected the incumbents' "vague[]" claims that unbundling should be restricted on the basis that it discouraged facilities-based competition, holding that the statutory goal was "to expedite the introduction of pervasive competition into the local telecommunications industry." Iowa Util.Bd. v. FCC, 120 F.3d 753, 815-816 (8th Cir. 1997). The Supreme Court did not disapprove that holding; indeed, it acknowledged that the Act granted broad rights to use incumbents' capabilities. Slip Op. at 29. Accordingly, any claims that the Commission should deny access to elements that satisfy the "necessary" and "impair" test on the generic grounds that unbundling is generally counterproductive or regulation is too costly should be disregarded for what they are: improper collateral attacks on the policy choices made by Congress.

Fourth, the Court rejected several ILEC claims that particular network elements identified by the Commission fall outside the statutory definition of Section 3(29). The incumbents' comments filed in Docket 96-98 generally agreed that loops, switching, interoffice transport, and signaling systems were network elements under Section 3(29), and that those elements satisfied the requirements of Section 251(d)(2) and should be required to be made available.⁴ However, incumbents challenged the Commission's designation of OSS, operator services and directory assistance, and vertical features as unbundled elements (or, in the case of vertical features, as part of another unbundled element), claiming such actions were beyond the Commission's authority. The Supreme Court summarily rejected each of those challenges. Slip Op. at 19-20. Consequently, there can no longer be any question that the Commission, after properly considering the factors set forth in Section 251(d)(2), has the authority to require that all of the elements it defined in Rule 319 (as well as any other

⁴ See, e.g., Ameritech Comments, pp. 34-51; Bell Atlantic Comments, pp. 22-32; NYNEX Comments, pp. 61-64; Pacific Telesis Group Comments, pp. 40-62; USTA Comments, pp. 28-36; US WEST Comments, pp. 47-48. While there were some substantial disagreements among the commenting parties over aspects of those elements -- such as sub-loop unbundling, or whether access to switching should include vertical features -- there was no significant disagreement over whether these four elements should be made available in some form.

elements that meet the statutory criteria) must be made available under Section 251(c)(3).

Fifth, the Court did not call into question the Commission's definition and application of the term "proprietary" in Section 251(d)(2). The Commission treated as "proprietary" only those elements "with proprietary protocols or . . . containing proprietary information." First Report and Order, ¶ 282. It found very few proprietary concerns with regard to the seven network elements it identified.⁵ No party has ever challenged any of these conclusions. This means that, assuming arguendo that non-proprietary elements are subject to the Section 251(d)(2) standards at all, only the "impair" standard -- and not the "necessary" standard -- will apply in almost all instances.⁶

⁵ Specifically, the Commission found no proprietary concerns with respect to the loop (First Report and Order, ¶ 388), the network interface device (id., ¶ 393), tandem switching (id., ¶ 425), transport (id., ¶ 446), signaling protocols for SS7 networks (id., ¶ 481), call-related databases (id., ¶ 490), and operator services and directory assistance (id., ¶ 539). It found some proprietary concerns with respect to the service creation environment and the service management system (id., ¶ 497), which it resolved in a manner conforming to the CLECs' stated needs.

⁶ A facial reading of Section 251(d)(2) indicates that this entire subsection was intended to apply only to proprietary elements. This paper, assumes however, solely for the purposes of argument, that the "impair" test applies to non-proprietary elements.

II. Aspects of the Commission's Analysis that Require Remand

In contrast, the Supreme Court found fault with only two specific aspects of the Commission's reasoning. First, the Commission had held that, in applying the "necessary" and "impair" standards, it would look only at whether a particular network element's functionality could be duplicated by another element within the incumbent LEC's network. See First Report and Order, ¶ 283. The Court held that the Commission must also look outside the network for possible substitutes.⁷

Second, the Commission (id., ¶ 285) held that the "impair" standard would be satisfied if CLECs could show that their costs would increase, or their quality of service would decrease, in any amount if they were forced to obtain a functionality outside the incumbent LEC's network (and that access was "necessary" if the CLECs would be "significantly impaired" in that sense, see id., ¶ 282). The Court held that this was erroneous because the Commission's construction of the statutory standard "assum[ed] that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary' and causes the failure to

⁷ Slip Op. at 22 ("[t]he Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network").

provide that element to 'impair' the entrant's ability to furnish its desired services." Slip Op. at 22 (emphasis in original). The Court noted that there could be situations in which CLECs who were forced to obtain substitutes for an ILEC unbundled network would face increased costs that might not reduce their ability to provide service, because they would only experience slightly diminished profits. Id., pp. 22-23.

Taken together, these two errors led the Court to conclude that the Commission had taken an extreme position: a proposed element would be deemed to fail the "impair" standard only if its functionality were duplicated by some different facility within the LECs' network, and at the same or lower cost. Thus, the Court's narrow holding was that the Commission had failed to provide "some limiting standard, rationally related to the goals of the Act." Id., p. 21 (emphasis in original). The Commission will satisfy the requirements of the remand if it identifies and applies a rational limiting standard -- and such a limiting standard is readily discernible from the Court's analysis and the language of Section 251(d)(2) on which the Court relied.

III. Import of the Court's Decision

The lesson of the Court's decision is that the Commission may not conclude that the mere presence of some cost or quality difference between the use of a network

element and the use of a substitute functionality from an alternative source satisfies either of the Section 251(d)(2) tests. Instead, it must inquire whether such differences -- or any other difference between the network element and the substitute -- effectively reduces CLECs' abilities to provide the services they want to offer.⁸ If CLECs could fully internalize the added burden imposed by such a difference so that their ability to provide the service remains unaffected, then the Section 251(d)(2) standards are not met.⁹ By contrast, if CLECs' ability to provide the proposed service would be adversely affected if they were required to use a proposed substitute, the Court's opinion confirms that the standard has been met.

Some incumbent LECs have extravagantly misread the Court's decision. Bell Atlantic, for example, has, baldly asserted that the Supreme Court's decision means that "elements that are available from other sources . . . do not have to be provided as unbundled 'network elements' under

⁸ See Slip Op. at 22 ("[a]n entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been 'impaired' in its ability to amass earnings, but has not ipso facto been 'impaired' . . . in its ability to provide the services it seeks to offer").

⁹ Thus, the Court addressed the example of a ladder that might be needed to change a light bulb. If, with a slightly shorter ladder, the person changing the bulb can still do the same job -- but will merely have to stretch his or her arm further -- the ability to change the bulb is not impaired.

the Act."¹⁰ This is patently wrong. The question of whether there is an alternative source of supply merely begins the inquiry under Section 251(d)(2) -- unless no practical alternative sources exist, in which case the inquiry must end because then the statutory standards are plainly met. If an alternative is available, the Commission must then examine whether forcing CLECs to use the alternative will adversely affect their ability to provide the services they seek to offer.

Thus, for example, if a cost difference (or any other difference) renders the provision of any service uneconomic, such that it is likely that entry would not occur or a service would not be provided -- taking into account not only the CLECs' costs of purchasing the functionality, but their costs of capital and working capital requirements, as well as their other efficient costs of providing service -- then the standard is met. Similarly, the standard is met if lack of access to a requested network element would produce a CLEC service of materially lower quality, would lengthen by a non-trivial amount the time it takes to bring the service to market, or would limit the scope or coverage of

¹⁰ See Statement of Bell Atlantic - Maryland, Inc., Case No. 8808, In the Matter of the Commission's Initiation of a Global Telecommunications Negotiation, pp. 1-2, n.1 (filed Jan. 29, 1999); see also Ameritech-Michigan's Motion to Vacate Judgment and Brief in Support, Case No. 5:98-CV-20, United States District Court for the Western District of Michigan (filed Feb. 3, 1999).

the CLEC service. Other examples of ways in which a difference might be service-affecting are discussed below. In all events, the fundamental point is straightforward. In all these examples, CLECs' abilities to provide their chosen services would be "impaired" because the service itself, or the CLECs' ability to provide it (and not merely the CLECs' profits), would be diminished if incumbents were permitted to deny them access to the requested element.

IV. Recommended Limiting Principles

We set forth below a set of rules that the Commission can apply that are consistent with the Supreme Court's mandate.¹¹ Critically, as shown below, several of these principles, and the analysis supporting them, have already been recognized in the Commission's earlier decisions.

A proprietary unbundled network element is *necessary* for the purposes of Section 251(d)(2)(A) if requesting carriers do not have available, from the incumbent or others, a reasonable substitute for such proprietary element that enables an efficient competitor to provide a telecommunications service in an economically and functionally viable manner, taking into account the economic and functional characteristics of the proprietary element.

Requesting carriers' ability to offer a telecommunications service is *impaired* for the purposes of Section 251(d)(2)(B) if their inability to obtain a requested [proprietary]¹² unbundled network element

¹¹ "[T]he Commission [must] determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." Slip Op. at 24 (emphasis in original).

¹² See footnote 6 above.

materially reduces their ability to offer the service. For purposes of this rule, the ways in which requesting carriers' inability to obtain an element may materially reduce their ability to offer a service include, but are not limited to, effects on the quality (including functionality), scope, or timeliness with which the service could be offered and the costs required to offer the service using a substitute functionality.

Factors to be considered in determining whether access to a proprietary unbundled network element is necessary, or whether requesting carriers' ability to offer service is impaired, include, but are not limited to:

- (a) Availability of substitute capabilities from the incumbent or other sources;
- (b) Whether a substitute capability requires requesting carriers to incur higher deployment costs or lower economies of scale compared to those of the requested element;
- (c) Practical difficulties in obtaining business arrangements necessary to obtain any substitute capability within the timeframes and in the quantities required by requesting carriers;
- (d) Reduced potential for requesting carriers to serve an equally broad base of customers using the substitute;
- (e) Additional time necessary to deliver services in the marketplace that is related to the requirement to obtain and implement the substitute;
- (f) Inferior functionality or performance of, or support capabilities for, the substitute compared to the requested element; and
- (g) Diminished ability of requesting carriers to provide service in conformity with their legal and regulatory obligations.

Items (a) through (c), as well as other factors identified by commenting parties, may be used to determine whether a substitute functionality is practically available to requesting carriers. If it is determined that a substitute functionality

is practically available, items (d) through (g), as well as other factors identified by commenting parties, may be used to determine whether use of the substitute would adversely affect the ability of requesting carriers to provide a meaningfully competitive service.

V. The Proposed Limiting Principles Are Fully Consistent with the Purposes of the 1996 Act

As described below, each of the factors in the proposed limiting principles is important in analyzing whether a requested element is necessary or its absence would impair CLECs' ability to provide telecommunications services. Consideration of each of these factors is directly related to, and required to achieve, the pro-competitive goals of the 1996 Act.

(a) Availability of Substitutes

Unbundled network elements are defined in terms of their functionality.¹³ Thus, the availability of substitute functionality must be the first step in the Commission's Section 251(d)(2) analysis of any requested unbundled network element. If there is no alternative source of supply for the functionality such an element provides, and the element is used in the provision of a telecommunications service, then that element is obviously necessary for CLECs to compete, whether or not it is proprietary.

In contrast, the theoretical availability of a substitute does not demonstrate that the functionality of a

¹³ First Report and Order, ¶ 258; Slip Op. at 19-20.

requested element is unnecessary; nor does it show that the inability to obtain the element would not impair CLECs' ability to provide telecommunications services. This principle is critical to the development of effective local competition. As the Commission (id., ¶ 287) correctly found, any element could be provided by a new entrant "in theory," but Congress established unbundling requirements in the Act because it recognized that such duplication would in many instances "delay" or foreclose attempts to compete against the incumbents' ubiquitous local networks and the sunk costs they reflect.

Thus, the possible availability of a substitute for requested unbundled network elements merely begins, rather than ends, the Commission's inquiry under both the necessary and impair tests.

(b) Economic Considerations

The First Report and Order (¶ 285) recognized that economic considerations are critical to determinations under both the necessary and impair tests. Although the Supreme Court criticized the "any difference in cost" standard the Commission applied, the Court cast no doubt on the general proposition that cost differences should play an important role in the Commission's analysis. Thus, it is appropriate for the Commission to examine cost impacts in making its decisions under Section 251(d)(2).

Appreciable differences in actual deployment costs and current and prospective economies of scale can obviously have a significant impact on CLECs' decisions to enter and compete in the local services market. Indeed, the Commission recognized that the 1996 Act "mandat[es] that the most significant economic impediments to economic efficiency" must be removed. Accordingly, the First Report and Order (¶ 11) holds -- in a finding left undisturbed by the appellate courts -- that the competitive goals of the Act cannot be achieved unless incumbents share their economies of density, connectivity, scope and scale with new entrants.

(c) Practical Constraints on Availability

The mere existence of a substitute capability also does not show that the Section 251(d)(2) standards cannot be met if, for example, practical difficulties involved in obtaining the substitute would impair CLECs' ability to provide service in a manner that is fully compatible with the ILEC. Thus, in considering whether a proposed substitute is in fact reasonably available to new entrants, the Commission should take account of any facts that show it may be materially more difficult for CLECs to obtain the substitute from a non-ILEC source than it would be to obtain the requested unbundled element from the ILEC. For example, it may take substantially longer to negotiate for or obtain

a substitute, or the potential source of supply may be insufficient or too unreliable to meet CLECs' needs.

Similarly, in determining whether a substitute is available from a non-ILEC source, the Commission should consider whether CLECs would need to establish multiple sources of supply, each potentially having different technical capabilities and quality, in order to serve the same geographic areas served by a single ILEC. It should also consider the commercial relationships that the CLEC would have to establish to obtain the substitute from another source, such as a CLEC. In particular, the Commission should consider the fact that CLECs typically deploy only the minimum amount of plant and equipment needed to support their own market entry plans. Thus, the feasibility of using CLECs as long-term sources of supply for other CLECs may be low.

(d) Reduced Addressable Market

The Act envisions that competition for local services will be broadly available and not limited to only those areas where CLECs could find alternative sources of supply. All consumers will not realize the benefits of the local competition Congress envisioned unless CLECs have access to network capabilities that provide them with the opportunity to offer services in product and service markets that are as extensive as those served by the ILEC.

If a proposed substitute does not offer CLECs the equivalent scope of opportunity, CLECs cannot compete on an even footing. For example, much of today's technology requires substantial volume to achieve operating economies. In many of the areas of the country where the incumbent is already operating, CLECs could not generate sufficient volumes to justify deploying their own assets. Thus, the Commission's requirement that ILEC monopolists must make their economies of density, scope and connectivity available to new entrants also supports the need to review information on this factor.

(e) Reduced Timeliness

Timeliness is a critical attribute that affects customers' perceptions of a carrier's ability to offer service. Moreover, prompt competitive entry is one of the central goals of the Act.¹⁴ CLECs' ability to compete will be significantly reduced if it takes them longer to introduce new services into an area than it takes the ILEC. Similarly, new entrants will not have a meaningful opportunity to compete if they cannot deliver existing services to individual customers as quickly as the ILEC. Therefore, a proposed substitute must enable CLECs to provide services (both new and existing) as quickly as they could if they used ILEC unbundled elements.

¹⁴ First Report and Order, ¶ 13.

(f) Reduced Quality

The First Report and Order (¶ 285) correctly recognizes that new entrants' ability to offer service would be impaired if their inability to use a requested element reduces the quality of the service they can offer. Indeed, the "equal quality of service" requirement is required by the Act's nondiscrimination principles and pervades the Commission's discussion in the First Report and Order, as well as subsequent decisions on related matters.¹⁵ The Supreme Court's decision does not question the importance of quality of service issues; rather, it merely objects to the "any difference" standard applied in the First Report and Order.¹⁶

Quality of service is determined by a variety of factors, each of which may be relevant in a particular case. At a minimum, however, the Commission should consider evidence that a proposed substitute does not enable new entrants to provide service that offers equal performance characteristics to the service that could be offered using a requested unbundled network element. Thus, for example, a substitute must provide CLECs with equivalent potential to meet necessary engineering parameters (e.g., loss, noise,

¹⁵ E.g., First Report and Order, ¶ 312.

¹⁶ Slip Op. at 24.

balance, dial tone delay, and blocking) and failure rates as the requested unbundled element.

Similarly, if a proposed substitute has more limited functionality than a requested network element, or if the operational or support capabilities available for the substitute are less robust than the support available through use of the requested unbundled element, a new entrant would not be able to offer a service of equivalent quality without access to the requested element.

(g) Ability to Offer Service in Compliance with Law

New entrants must be able to offer their services in a manner that complies with the legal obligations of all local exchange carriers. Accordingly, if using a proposed substitute would diminish requesting carriers' ability to provide service in conformity with these obligations, it cannot be considered a viable option.

VI. Recommended Modifications to Network Element Definitions

In addition to developing the principles that will be applied to the Section 251(d)(2) analysis, it is also appropriate for the Commission to review the definitions of the elements themselves. In general, we believe that Rule 319 established appropriate definitions of the unbundled network elements that new entrants need to provide voice services in competition with incumbents. We set forth below some proposed modifications based on our experience over the

last several years, and in anticipation of the need to assure a competitive marketplace for advanced telecommunications services.

Local Loop: Consistent with the comments we filed in CC Docket No. 98-147, we suggest that the Commission modify the definition of the local loop in the following respects:

- In order to enable new entrants to provide advanced services, the definition should be modified to state that a local loop includes non-discriminatory connection by the incumbent LEC of the loop to other ILEC network elements, or termination of the loop at a point where requesting telecommunications carriers can connect it to other ILEC network elements and/or to their own facilities or equipment in a manner that does not impair their ability to provide service.

This modification is necessary in order to resolve ongoing debates over whether the ILEC or the CLEC must provide the physical cross-connections and cabling between the ILEC's main distribution frame and a CLEC's collocation space. This language also clarifies that when the ILEC provides a combination consisting of the local loop and other unbundled elements to a requesting telecommunications carrier that the ILEC itself uses in similar configurations in its network, it is the ILEC that is responsible for connecting such elements, even if they are not currently connected to serve the specific retail customer utilizing